Supreme Court, U.S.
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No. 03-1002

In The

SUPREME COURT OF THE UNITED STATES

MARIA DESOUZA,
Petitioner,

vs.

THE UNIVERSITY OF CALIFORNIA, DAVIS MEDICAL CENTER, THE REGENTS OF THE UNIVERSITY OF CALIFORNIA
Respondents,

Petition for Writ of Certiorari to the Court of Appeal of California
Third Appellate District

BRIEF OF RESPONDENT REGENTS OF THE UNIVERSITY OF CALIFORNIA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Nancy J. Sheehan*
PORTER SCOTT WEIBERG & DELEHANT
350 University Avenue, #200
Sacramento, CA 95825
(916) 929-1481

**Counsel of Record*

QUESTIONS PRESENTED

1. "Whether the ruling of Prevailing Party is a violation of Equal Access to Justice Act, 28 U.S.C. §2412(d) (EAJA)."

2. "In light of jury finding of breach of Covenant of Good Faith and Fair Dealing, whether termination of employment and award of attorney fees results in improper taking, in violation of substantive Due Process Clauses of the U.S. Constitution."

3. "Whether the award of attorney fees is a violation of First Amendment Freedom of Speech of the U.S. Constitution."

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INTRODUCTION

Petitioner Maria DeSouza ("Petitioner" or "DeSouza") seeks the aid of this Court to overturn a state trial court decision awarding Respondent The Regents of the University of California ("the Regents") attorney's fees as provided by a settlement agreement between both parties. The contractual attorney's fee provision was enforceable through a state statute. All of DeSouza's claims, from her complaint at the trial court level to her petition for review to the California Supreme Court, were based on state law. In an attempt to obtain jurisdiction in this Court, Petitioner now alleges federal claims for the first time. Since Petitioner failed to raise a federal issue in prior proceedings, jurisdiction for her Petition for Writ of Certiorari is lacking. Accordingly, this Court should deny review.

STATEMENT OF THE CASE

Petitioner is a former employee of Respondent. Respondent originally hired DeSouza in 1983. She was terminated approximately ten years later. Subsequently, Petitioner obtained legal representation to challenge her discharge. After negotiations, both parties reached a written Settlement Agreement ("Agreement"). As part of the compromise Respondent agreed to reinstate Petitioner. The Agreement also contained a clause awarding attorney's fees, costs, and expenses to a party prevailing in any action to enforce the Agreement.

In compliance with the agreement, Respondent assigned Petitioner to work in the Molecular Cytogenetics Laboratory at the University of California, Davis, to perform medical testing. While performing laboratory medical tests, Petitioner committed significant errors. On one occasion Petitioner reported an HIV negative patient as HIV positive. DeSouza was first issued a warning and later suspended when her performance failed to improve. The performance deficiencies continued after the suspension. Thus, Respondent served Petitioner with a Letter of Intent to Dismiss. DeSouza contested her dismissal and commenced the administrative grievance proceedings provided by the Regents. After proceeding through all steps of the grievance process, the

hearing officer upheld Petitioner's dismissal.

Petitioner immediately filed suit in California Superior Court. She alleged twelve state law causes of action, including a breach of the settlement agreement and a breach of the covenant of good faith and fair dealing in performing the Agreement. The case proceeded to trial on claims of (1) breach of contract, based on the Agreement, (2) breach of the covenant of good faith and fair dealing, and (3) wrongful termination in violation of public policy. All claims were based on state law. When the jury returned its verdict, it found for Respondent on all claims but one. The jury found that Respondent had breached the implied covenant of good faith and fair dealing in its execution of the Agreement. However, the jury concluded that Petitioner did not sustain any damages as a result of that breach. Since Respondent prevailed on the breach of contract claim, the trial court awarded it costs and attorney's fees as provided by the agreement.

Petitioner appealed to the California Court of Appeal. In her appeal, Petitioner only raised four issues: (1) an exclusion of character evidence, (2) a denial of a judgment notwithstanding a verdict, (3) alleged juror misconduct under California Code of Civil Procedure §657 and California Evidence Code §1150, and (4) the apportionment of attorney's fees under California Civil Code §1717. The California Court of Appeal affirmed the trial court's rulings on all four issues. Petitioner then appealed to the California Supreme Court. The California Supreme Court denied review. Not deterred, Petitioner now appeals to this Court.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

A. ACCEPTING PETITIONER'S WRIT OF CERTIORARI WOULD EXCEED THE JURISDICTION OF THIS COURT

Federal courts are courts of limited jurisdiction. (Delaware v. Van Arsdall, 475 U.S. 673, 691 (1986).) As such, a federal court may only exercise the authority conferred on it by Article III or by a congressional enactment pursuant to Article III. (Id.) This Court has

interpreted the Judiciary Act of 1789 as only granting jurisdiction to this Court to review state court decisions where a federal question was raised in a prior state court proceeding. (Cardinale v. Louisiana, 394 U.S. 437, 438 (1969); Howlett v. Rose, 496 U.S. 356, 370 (1990).) Thus, this Court has refused to decide federal constitutional issues raised for the first time on a Petition for Writ of Certiorari. (Cardinale, 394 U.S. at 438.) "[A]t the minimum . . . there should be no doubt from the record that a claim under a *federal* statute or the *Federal* Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law." (Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71, 77-8 (1988) (emphasis original) citing Webb v. Webb, 451 U.S. 493, 501 (1981).)

Petitioner did not raise a federal claim prior to this Petition for Writ of Certiorari. Her complaint alleged twelve *state* law causes of action.[1] Her appeal to the California Court of Appeal only raised four issues for review: (1) an exclusion of character evidence, (2) a denial of a judgment notwithstanding a verdict, (3) alleged juror misconduct under California Code of Civil Procedure §657 and California Evidence Code 1150, and (4) apportionment of attorney's fees under California Civil Code §1717. Petition Appendix C-3,4. No allegation of a federal violation was made to the California Court of Appeal. After losing her appeal, Petitioner asked the California Supreme Court to review the appellate court decision without adding a federal issue. The California Supreme Court denied review. Petition Appendix A-1. Since no federal question was raised in a prior state proceeding, this Petition must be dismissed for want of jurisdiction.

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[1] (1) breach of contract, (2) bad faith, (3) intentional misrepresentation, (4) negligent misrepresentation, (5) negligence, (6) race discrimination under the California Fair Employment and Housing Act (FEHA), (7) national origin discrimination under FEHA, (8) discharge in violation of public policy, (9) violation of California Labor Code §1102.5, (10) defamation, (11) intentional infliction of emotional distress, and (12) negligent infliction of emotional distress. Only three of these claims proceeded to trial.

B. THIS COURT SHOULD NOT EXERCISE ITS DISCRETION TO REVIEW THE FIRST QUESTION PRESENTED BECAUSE PETITIONER ASKS THIS COURT TO REVIEW AN ALLEGED VIOLATION OF A STATUTE THAT DOES NOT APPLY TO THE ACTION BETWEEN PETITIONER AND RESPONDENT.

Petitioner's first Question Presented states:

> "Whether the ruling of Prevailing Party is a violation of the Equal Access to Justice Act, 28 U.S.C. §2412(d) (EAJA)."

1. 28 U.S.C. §2412(d) DOES NOT APPLY TO PETITIONER'S CLAIMS BECAUSE THE UNITED STATES IS NOT A PARTY TO THIS ACTION

By its terms 28 U.S.C. §2412(d) only applies to civil actions where the United States is a party:

> "Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, *brought by or against the United States* in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." (§2412(d)(1)(A) (emphasis added).)

As Petitioner's own Petition for Writ of Certiorari concedes, this appeal is the product of a lawsuit between her and the Regents. Petition

at 4. The Regents is an instrumentality of the State of California. (Hamilton v. Regents of University of California, 293 U.S. 245, 257 (1934); Thompson v. Los Angeles, 885 F.2d 1439, 1442-3 (9th Cir. 1989).) Section 2412(d)(1)(A) expressly states that it only applies to actions brought by or against the United States. Nowhere in her Petition does Petitioner allege that the United States was a party to this action. Since the United States is not a party to this action, §2412(d) is inapplicable. Accordingly, the Regents respectfully request that this Court deny review of the First Question Presented by Petitioner DeSouza.

C. THIS COURT SHOULD NOT EXERCISE ITS DISCRETION TO REVIEW THE SECOND QUESTION PRESENTED BECAUSE IT FAILS TO RAISE ANY COHERENT CLAIMS UNDER THE SUBSTANTIVE DUE PROCESS DOCTRINE OR THE TAKINGS CLAUSE.

Petitioner's Second Question Presented states:

> "In light of jury finding of breach of Covenant of Good Faith and Fair Dealing, whether termination of employment and award of attorney fees results in improper taking, in violation of substantive Due Process Clauses of the U.S. Constitution."

1. A CHALLENGE TO THE CONSTITUTIONALITY OF THE CALIFORNIA SUPREME COURT'S DISCRETIONARY POWER TO GRANT REVIEW MUST BE DIRECTED AGAINST THE CALIFORNIA SUPREME COURT NOT RESPONDENT

In the first subheading of the argument of the Second Question Presented Petitioner argues that: "Failure of the California Supreme Court to grant the petition for review results in improper taking." Petition at 13. If Petitioner is alleging that *the California Supreme Court*

has violated her Due Process rights by failing to grant review of the state appellate court decision, then Petitioner's Petition for Writ of Certiorari should be denied because she has asserted her Due Process claim against the wrong party. The Regents did not deny Petitioner's petition for review to the California Supreme Court nor is the Regents vicariously liable for acts or omissions of the California Supreme Court. Moreover, the California Supreme Court properly exercised its discretion to deny review. (California Rules of Court, rule 28(b),(c)(1); People v. Rios 23 Cal.4th 450, 459 (2000).) The power of a state's highest court to exercise discretionary review is well-established and not reasonably subject to dispute. (See O'Sullivan v. Boerckel, 526 U.S. 838., 845 (1999).)

The rest of this subsection makes no further argument. It merely recites some general principles of the Fourteenth Amendment and ends with a statement that Petitioner's "property and liberty interest in her employment has not been a subject of dispute during the course of trial and appeal." Petition at 15. This subsection does substantiate Petitioner's claim that Respondents violated her due process rights.

2. PETITIONER'S SECOND SUBSECTION FAILS TO RAISE ANY COHERENT REASON WHY A DUE PROCESS VIOLATION OR A TAKING OCCURRED

The heading for the second subsection of the Second Question presented states that: "Loss of State Employment Constitutes a Taking." Petition at 15. This subsection begins with a brief discussion of substantive due process violations with respect to discharges of public employees and then discusses the takings clause under the Fifth Amendment. The subsection ends with a statement, not achieving the status of a conclusion, that the Regents was awarded attorneys fees despite a finding that it violated the covenant of good faith and fair dealing. It is unclear whether this subsection actually makes an argument, but Respondent will nonetheless briefly respond to Petitioner's statements.

As Petitioner points out, a termination from public employment can in some circumstances violate the Due Process Clause. Typically, this occurs when a public employee is discharged without a hearing or other procedure. (See Board of Regents v. Roth, 408 U.S. 564 (1972); Perry v. Sindermann 408 U.S. 593 (1972).) This Court has also suggested that a public employee may state a substantive due process claim if his or her discharge from public employment was related to "the individual's freedom of choice with respect to certain basic matters of procreation, marriage, and family life." (Harrah Independent School Dist. v. Martin, 440 U.S. 194, 198 (1979).) Petitioner has failed to allege either of these scenarios in her prior judicial proceedings or her Petition for Writ of Certiorari. In fact, Petitioner went through an extensive administrative process prior to her discharge. Furthermore, Petitioner has never alleged that her discharge was a result of anything related to procreation, family, or marriage. Petitioner has no basis to allege that either a procedural or a substantive due process violation occurred when she was dismissed.

The takings clause of the Fifth Amendment protects private citizens from deprivation of private property by the federal government. The Regents is not a federal government actor, thus it is not subject to the Fifth Amendment. If Petitioner meant a taking under the Fourteenth Amendment, which makes the Fifth Amendment applicable to state actors, her argument is still without merit. (Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 160 (1980).) A taking requires appropriation of *private* property. (Id.) No case has held that *public* employment is *private* property for purposes of the takings clause.[2] Thus, Petitioners loss of state employment could not constitute a taking of private property without just compensation.

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[2] Respondent does not disagree with the proposition that a public employee may have a "property" interest in public employment for purposes of procedural due process. See Perry v. Sindermann 408 U.S. 593, 603 (1972).

3. FEDERAL STATUES REGARDING THE APPORTIONMENT OF ATTORNEY'S FEES UNDER 42 U.S.C. §1983 ACTIONS DO NOT APPLY TO THE ACTION BETWEEN PETITIONER AND RESPONDENT BECAUSE PETITIONER NEVER RAISED A §1983 CLAIM

The heading for the third subsection of the Second Question presented states that: "DeSouza's termination is not rationally related to public purpose." Petition at 16-17. This section begins with a discussion of the "public use" requirement for a taking and the inexplicably veers off into a discussion of whether a court should award attorney's fees to a defendant when a plaintiff files a litigation in bad faith. This subsection ends with a reiteration of the concluding paragraph in the last subsection to the effect that the Regents was awarded attorneys fees despite the fact that the jury found it violated the covenant of good faith and fair dealing, albeit with no resulting damage to petitioner.

As discussed above, Petitioner has no basis for a takings claim since public employment is in no sense private property. Id. The takings clause simply does not apply to DeSouza's situation.

The second argument in this subsection appears to allege that attorney's fees should not be awarded to the Regents because it was found to have violated the covenant of good faith and fair dealing at the trial court level. In support of her argument, Petitioner cites Rosewitz v. Latting, 689 F.2d 175, 178 (10th Cir. 1982). This case briefly discusses 42 U.S.C. §1988, which gives a court discretion to award attorney's fees to a party prevailing under a 42 U.S.C. §1983 claim. This case is inapplicable to Petitioner as she did not file a 42 U.S.C. §1983 claim. In addition, the portion of Rosewitz cited by Petitioner stands for the proposition that a court may award a prevailing *defendant* attorneys fees for frivolous or vexatious claims *asserted by a plaintiff*. All irony regarding frivolous claims or appeals aside, the Regents is a prevailing defendant, therefore the issue discussed in Rosewitz would still not apply even if Petitioner had asserted a §1983 claim.

4. PETITIONERS ARGUMENT THAT THE CALIFORNIA COURT OF APPEAL MISAPPLIED STATE LAW REGARDING THE APPORTIONMENT OF ATTORNEYS' FEES IS BEYOND THE JURISDICTION OF THIS COURT

The final heading for the Second Question presented states that: "The award of attorney fees should not subject plaintiff to financial ruin." Petition at 18. This subsection briefly discusses California law regarding attorney's awards. Petitioner cites various California statutes for the general rule that an "attorney fee award must have a basis in statute, contract, or law." Petition at 19. Petitioner ends this section with a conclusion that the attorney's fees award to the Regents was inappropriate because it was not awarded pursuant to a statute. Id. Ironically enough, on the very next page of Petitioner's brief, she acknowledges that the Regents was awarded attorney's fees pursuant to a contract. Petition 20. Notably absent in this subsection is a discussion of the violation of the due process or the takings clause alleged in the Second Question Presented. Instead, Petitioner argues that the California Court of Appeal misinterpreted California law by awarding attorney's fees to Regents instead of to her.

The scope of this Court's power to review final judgments of a state court decision is set out by 28 U.S.C. §1257. That section authorizes only review of decisions from a state court "where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States." 28 U.S.C. §1257(a). Petitioner's argument in this subsection fails to allege a violation of a federal statute or a United States constitutional provision. Instead, this section only purports to allege a misinterpretation of California law by the California Court of Appeal. Accordingly, this Court should disregard the argument in subsection four of the Second Question Presented.

D. THIS COURT SHOULD NOT EXERCISE ITS DISCRETION TO REVIEW THE THIRD QUESTION PRESENTED BECAUSE IT IS BASED ON A MISAPPLICATION OF THE LAW

Petitioner's Third Question Presented states:

> "Whether the award of attorney fees is a violation of First Amendment Freedom of Speech of the U.S. Constitution."

1. PETITIONER'S THIRD QUESTION PRESENTED ALLEGING A FIRST AMENDMENT VIOLATION IS BASED ON THE FALSE PREMISE THAT SHE IS A PREVAILING PARTY

The heading in the Third Question Presented alleges that "The award of attorney fees after a favorable jury verdict chills DeSouza's expression and her right to exercise First Amendment rights." Petition at 20. Petitioner's argument is based on the faulty premise that she received a "favorable" verdict at the trial court level. Petitioner is correct that the jury found that Respondent violated the covenant of good faith and fair dealing. Petition Appendix C-58. However, California Code of Civil Procedure §1032, which governs attorneys fees granted by contract, has been interpreted as requiring more than merely proving liability to make a plaintiff a "prevailing party." (Childers v. Edwards 48 Cal.App.4th 1544, 1549 (1996).) "Winning on liability but failing to prove any damages does not result in any benefit to a plaintiff. Proving liability proves only an *element* of a cause of action, not the cause of action itself." Id. at 1550 (emphasis original). Thus, Petitioner's argument that her First Amendment rights were violated because she did not receive attorneys fees despite being a "prevailing party" is based on a misunderstanding of the law and therefore without merit.

Petitioner also alleges that "[t]his decision has the chilling effect of deterring plaintiffs from mitigating damages and bringing lawsuits against employers even after the employer is found to have acted in bad

faith." Petition 21. This argument is also illogical. An employer cannot be found to have acted in bad faith until *after* a court has made such a determination. Thus, potential plaintiffs will not be deterred from filling actions "against employers even after the employer is found to have acted in bad faith," since no determination of bad faith would have been made at the point the suit was filed.

Petitioners arguments in support of her Third Question presented do not suggest any sound reason why this Court should accept review. Instead, Petitioners claim of a violation of her First Amendment rights stem from situations that either never happened or could not happen. Thus, Respondents respectfully request that this Court deny review of the Third Question Presented.

CONCLUSION

This petition is little more than an effort to escape the consequences of suing for breach of contract that contains a clause allowing the prevailing party to receive an award of attorney's fees and losing at trial. Had DeSouza prevailed on the breach of contract claim, she certainly would not be arguing that the clause she agreed to be bound to is unconstitutional. The jury, the State Court of Appeal, and the California Supreme Court all made the proper findings in ths case.

Since Petitioner failed to raise a federal question at the state court level, this Petition for Writ of Certiorari lacks jurisdiction. In addition, this Petition raises no important federal question or conflict between the United States Court of Appeals. Accordingly, Respondent respectfully requests that this Court deny Maria DeSouza's Petition for Writ of Certiorari in its entirety.

Dated: February 11, 2004

Respectfully submitted,

Nancy J. Sheehan
PORTER, SCOTT WEIBERG & DELEHANT
350 University Avenue, Suite 200
Sacramento, CA 95825